

## **CHAPTER 8**

### **JUDICIAL REVIEW**

#### **8-1. Introduction.**

Under section 7123(a) of the Statute, any person aggrieved by any final order of the Federal Labor Relations Authority, with two exceptions, may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the U.S. Court of Appeals in the circuit in which the person resides or transacts business, or in the U.S. Court of Appeals for the D.C. Circuit. Section 7123(a) excludes from judicial review orders under section 7112 of the Statute, which involve an appropriate unit determination, and orders under section 7122, which involve decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. Consequently, an order of the Authority resolving exceptions to an arbitration award would be subject to judicial review when the Authority's order involves an unfair labor practice.

Concurrently, under section 7123(b), the Authority may petition an appropriate U.S. Court of Appeals for the enforcement of any of its orders, for appropriate temporary relief, or for a restraining order.

Parties may request the General Counsel of the Authority to seek appropriate temporary relief (including a restraining order) in a U.S. district court under section 7123(d). The General Counsel will initiate and prosecute injunction proceedings only on the approval of the Authority. A determination by the General Counsel not to seek approval of the Authority for temporary relief is final and may not be appealed to the Authority.

Upon the issuance of a complaint and when seeking such relief is approved by the Authority, a regional attorney of the Authority or other designated agent may petition any U.S. district court, within any district in which the unfair labor practice is alleged to have occurred or the respondent resides or transacts business, for appropriate temporary relief. Section 7123(d) directs that the district court shall not grant any temporary relief when it would interfere with the ability of the agency to carry out its essential functions, or when the Authority fails to establish probable cause that an unfair labor practice was committed.

#### **8-2. Standard of Review.**

The standard of review of the decisions of the Authority is narrow. *E.g., U.S. Naval Ordnance Station v. FLRA*, 818 F.2d 545, 547 (6th Cir. 1987). Section 7123(c) of the Statute provides that review of an order of the Authority shall be conducted on the record in accordance with the Administrative Procedures Act, 5 U.S.C. § 706. Section 706(2)(A) of the Act requires the reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The reviewing courts must, however, give deference to the decisions of the Authority. In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983), the U.S. Supreme Court noted that the Statute intends the Authority to develop specialized expertise in the field of labor relations and to use that expertise to give content to the principles and goals set forth in the Statute. Consequently, the Court ruled that the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the Statute to the complexities' of federal labor relations." *Id.* (citations omitted). Accordingly, reviewing courts recognize that in order to sustain the Authority's application of the Statute, the court does not need to find that the Authority's construction is the only reasonable one or that the Authority's result is the result that the court, itself, would have reached. Instead, the courts adopt the Authority's construction when it is reasonably defensible and there is no compelling indication of error. See e.g., AFGE Local 3748 v. FLRA, 797 F.2d 612, 615 (8th Cir. 1986). The U.S. Court of Appeals for the D.C. Circuit specifically explained the constraints of judicial review as follows:

We are not members of Congress, with the power to rewrite the terms of a law which may have revealed infirmities in its implementation. Nor are we members of the FLRA, to whom Congress delegated the primary authority to fill in interpretative voids in the [Statute]. . . . [T]he dissent's main theme is that the Authority's interpretation should be reversed because it is not the best, or the most reasonable one. We view our task, in contrast, as simply deciding, whether, given the existence of competing considerations that might justify either interpretation, the Authority's interpretation is clearly contrary to statute or is an unreasonable one.

AFGE v. FLRA, 778 F.2d 850, 861 (D.C. Cir. 1985).

Thus, an interpretation of the Statute by the Authority, when reasonable and coherent, commands respect. The courts are not positioned to choose from plausible readings the interpretation the courts think best. Their task, instead, is to inquire whether the Authority's reading of the Statute is sufficiently plausible and reasonable to stand as governing law. See e.g., AFGE Local 225 v. FLRA, 712 F.2d 640, 643-44 (D.C. Cir. 1983). A court is not to disturb the Authority's reasonable accommodation of conflicting policies that were committed to the Authority by the Statute. AFGE v. FLRA, 778 F.2d at 856.

At the same time, the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97, cautioned that deference due an expert tribunal "cannot be allowed to slip into a judicial inertia." Accordingly, the Court stated that while courts should uphold reasonable and defensible interpretations of an agency's enabling act, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id.* (citations omitted). The Court also advised that when an agency's decision is premised on an understanding of a specific congressional intent, the agency is engaging in the "quintessential judicial function of deciding what a statute means." *Id.* at 98 n.8. In such a case, the agency's interpretation may be influential, but it cannot bind a court. *Id.*

The standard of review accorded Authority decisions that involve an examination of law other than the Statute or regulations other than its own is generally broader than the standard of review accorded their decisions interpreting and applying the Statute. See e.g., California National Guard v. FLRA, 697 F.2d 874, 879 (9th Cir. 1983). For example, one court has stated that the Authority is due "respect," but not "deference," when interpreting or applying statutes and regulations other than its own. Professional Airways System Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). However, deference has been granted the Authority's rulings involving the interpretation of law other than the Statute when the court perceived that the interpretation "bears directly on the 'complexities' of federal labor relations." Health and Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir. 1987) (quoting Bureau of Alcohol, Tobacco, and Firearms, 464 U.S. at 97).

In sum, these pronouncements reaffirm the general principle that courts will give great weight to an interpretation of a statute by the agency entrusted with its administration. In other words, the courts will follow the construction of the Statute by the Authority unless there are compelling indications that it is wrong. E.g., NFFE Local 1745 v. FLRA, 828 F.2d 834, 838 (D.C. Cir. 1987).

### **8-3. Court Review of Issues Not Raised Before the Authority.**

Section 7121(c) of the Statute provides that absent extraordinary circumstances, no objection which has not been urged before the Authority shall be considered by a reviewing court. The meaning of this provision has been explained as effectively designating the Authority as the sole factfinder and as the first-line decision maker, and designating the courts as reviewers. Treasury v. FLRA, 707 F.2d 574, 579-80 (D.C. Cir. 1983). Thus, in Treasury v. FLRA, the court ruled that it could not review issues that an agency never placed before the Authority. In the view of the court, such action would in large measure transfer the initial adjudicatory role Congress gave the Authority to the courts in clear departure from the statutory plan. *Id.*

The U.S. Supreme Court has explained that the plain language of section 7123(c) evidences an intent that the Authority shall pass on issues arising under the Statute and shall bring its expertise to bear on the resolution of those issues. Consequently, in EEOC v. FLRA, 476 U.S. 19 (1986), the Court dismissed a writ of certiorari as having been improvidently granted when the agency failed to excuse its failure to raise before the Authority the same principal objections it raised in its petition for certiorari.

### **8-4. Review of Specific Categories of Cases.**

#### **a. Decisions of the Authority Resolving Exceptions to Arbitration Awards.**

Section 7123(a) excludes from judicial review orders under section 7122 of the Statute, which pertain to decisions resolving exceptions to arbitration awards, unless the order of the Authority under section 7122 involves an unfair labor practice. In other words, decisions of the Authority resolving exceptions to arbitration awards are only judicially reviewable when the decision involves an unfair labor practice. Consistent with the

legislative history to the Statute, the courts have narrowly construed the provision for judicial review of Authority decisions in this area.

The Conference Report which accompanied the bill that was enacted and signed into law stated: "The conferees, in light of the limited nature of the Authority's review, determined that it would be inappropriate for there to be subsequent review by the court of appeals in such matters." Consistent with this congressional intent, the U.S. Courts of Appeals for the 4th, 9th, and 11th Circuits have all concluded that there was no jurisdiction to consider a petition for review of such Authority decisions. Tonetti v. FLRA, 776 F.2d 929 (11th Cir. 1985); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983); AFGE Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982). For instance, in U.S. Marshals Service, the 9th Circuit believed that there is no jurisdiction unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the Authority. In particular, the court stated that there would be no jurisdiction in the common case where the collective bargaining agreement is the basis for the arbitration award and the Authority's review. The court explained that to grant judicial review whenever a collective bargaining dispute can also be viewed as an unfair labor practice would give too little scope and effect to the arbitration process and to the final review function of the Authority, both of which Congress made a central part of the Statute. The D.C. Circuit, in consolidated cases, found that it lacked jurisdiction in one case, but reviewed and remanded the other case. Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987). In both cases, the court followed the narrow construction of section 7123 by the 9th Circuit in U.S. Marshals Service, but determined in the one case that it had jurisdiction to review the decision of the Authority because an unfair labor practice was involved or necessarily implicated.

The effect of this provision of section 7123 generally precluding judicial review has also been addressed in the context of judicial review of an Authority decision finding an unfair labor practice for refusing to comply with an arbitration award as to which exceptions to the award were denied by the Authority. In the unfair labor practice cases before the Authority, the Authority has held that the arbitration award became final and compliance was required when the exceptions to the arbitration award were denied; and that the Authority would not relitigate the denial in the unfair labor practice proceeding.

In such cases, the courts have likewise declined review of the underlying Authority decision denying exceptions. The courts have refused to attribute to Congress the intent of allowing the courts to do indirectly what Congress specifically prevented courts from doing directly under section 7123(a). Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986). In DOJ v. FLRA, the court concluded that in order for judicial review to be available, the unfair labor practice must be part of the underlying controversy that was subject to arbitration and not some "after the fact" outgrowth of the refusal to abide by the arbitrator's award. 792 F.2d at 28. To the U.S. Court of Appeals for the 9th Circuit, this "roundabout way of obtaining appellate review of a nonreviewable arbitration award has little to commend it in terms of judicial economy" and "flies in the face of legislative intent." U.S. Marshals Service v. FLRA, 778 F.2d 1432, 1436 (9th Cir. 1985). In agreeing with the Authority's method of disposing of these cases, the court stated that it would review the award only to determine whether an unfair labor practice was committed by refusing to comply. *Id.* at 1437. A U.S. district court has reviewed an Authority decision resolving

exceptions to an arbitration award on the ground that the Authority's decision deprived an employee of a property interest in violation of the Fifth Amendment due process clause. The U.S. Court of Appeals for the D.C. Circuit ruled that neither the Statute nor the legislative history to the Statute was sufficient to preclude judicial review of a constitutional claim in U.S. district court. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988). Citing the case of Leedom v. Kyne, 358 U.S. 154 (1958), the court also indicated that judicial review would be available in U.S. district court where the Authority had acted in excess of its delegated powers and contrary to a specific provision of the Statute. The court explained, however, that the Leedom v. Kyne exception is intended to be of extremely limited scope and that the action is not one to review a decision of the Authority made within its jurisdiction. Rather, the action is one to strike down a decision of the Authority made in excess of its delegated powers.

b. Authority Decisions in Representation Proceedings.

In addition to the specific provision of section 7123(a) precluding judicial review of Authority determinations of appropriate units under section 7112 of the Statute, the U.S. Court of Appeals for the D.C. Circuit has held that Congress intended that Authority decisions in representation cases would not be reviewable because they were not final orders. Department of Justice v. FLRA, 727 F.2d 481 (D.C. Cir. 1984). Specifically, the court held that an Authority decision under section 7111 setting aside an election and directing another election was not final and consequently was not reviewable. The court concluded that Congress made it clear that the provisions of the Statute concerning court review of representation proceedings were based on established practices of the National Labor Relations Board. 727 F.2d at 492. In this respect, the court noted that NLRB orders directing elections have consistently been found not to be final. In addition, the court noted similar treatment by the courts of "any type of order by the Board during representation proceedings, which include the determination of an appropriate bargaining unit, the direction of an election, ruling on possible election objections, and the certification of a bargaining representative." *Id.* (citations omitted).

c. Decisions of the Federal Service Impasses Panel.

In Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984), the court affirmed the dismissal by the U.S. district court for lack of jurisdiction of an appeal from a decision of the Federal Services Impasses Panel. The court held that Congress clearly precluded direct judicial review of decisions and order of the Panel. The court explained that instead, Panel decisions and orders are reviewable through unfair labor practice proceedings for refusing to comply, first by the Authority and then by the courts in an appeal from the Authority's decision and order in an unfair labor practice case under section 7123 of the Statute. The court emphasized that in such an appeal, it may review the validity of the Panel decision and order as to which compliance was refused. 735 F.2d at 1500. The court indicated, however, that a U.S. district court may exercise Leedom v. Kyne jurisdiction to invalidate a Panel decision and order when the extraordinary circumstances required under Leedom are presented.

d. Authority Statements of Policy or Guidance.

In AFGE v. FLRA, 750 F.2d 143 (D.C. Cir. 1984), the court held that Authority issuances on general statements of policy or guidance were judicially reviewable under section 7123(a). The court determined that Authority's statement on policy or guidance was final and was encompassed by the term "order" as used in section 7123(a). The court also determined that the Authority's statement was ripe for review. The court concluded that the issue was solely one of law, and the impact of the Authority's statement on the union was definite and concrete.

e. Refusals by the General Counsel to Issue a Complaint.

In Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982), the court held that Congress clearly intended the General Counsel of the Authority to have unreviewable discretion to decline to issue unfair labor practice complaints. The court noted that the legislative history to the Statute makes clear that the role and functions of the General Counsel were closely patterned after the General Counsel of the NLRB. In this respect, the court emphasized that it is clear under the National Labor Relations Act that a decision of the NLRB General Counsel declining to issue an unfair labor practice complaint is not a final order of the NLRB and consequently is not judicially reviewable. Thus, the court ruled that the General Counsel of the Authority must be accorded the same discretion with respect to the issuance of complaints as the NLRB General Counsel.

#### **8-5. Temporary Relief in U.S. District Court.**

As noted, section 7123(d) of the Statute authorizes the Authority to seek appropriate temporary relief (including a restraining order) in U.S. district court. The injunctive proceedings are initiated and prosecuted by the General Counsel only on the approval of the Authority. As noted by the court in U.S. v. PATCO, 653 F.2d 1134 (7th Cir. 1981), before relief can be sought, there must be an unfair labor practice charge filed and there must be a determination to issue a complaint. Section 7123(d) directs that a court shall not grant any temporary relief if the Authority fails to establish probable cause to believe that an unfair labor practice is being committed. Section 7123(d) also directs that a court shall not grant any temporary relief if such relief will interfere with an agency's ability to carry out its essential functions.